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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF TITANIC INTERNATIONAL, INC. AND DESCENDANTS OF PASSENGERS AND CREW MEMBERS ABOARD THE S.S. CENTRAL AMERICA DURING HER FINAL VOYAGE IN SUPPORT OF PETITIONER

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Titanic International, Inc. and descendants of passengers and crew members aboard the *S.S. Central America* * hereby move, pursuant to Rule 37.2 of the

* These descendants are Captain Herndon Oliver III, USN, and Herndon Oliver, Jr. (descendants of the Captain Herndon who was at the helm of the *S.S. Central America* during her last voyage), Linda Beaver, James F. Bell, Marge Bethard, Charlotte K. Boardman, Elizabeth B. Carrick, Florence Cheeseman, Dottie Smith Dicks, Henry Doerr, Wanda Lee Smith-Dreon, Ruth Hull Falk, Albro T. Gaul, Fred Grant, Genevieve Ellis Gross, Charles Henderson, Nor-

Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Titanic International, Inc. is a New Jersey nonprofit corporation dedicated to preserving the history of great ocean liners and the people who sailed them. Named for the most famous ocean liner ever, the *RMS Titanic*, Titanic International celebrates all passenger ships. The group of descendants of passengers and crew members aboard the *S.S. Central America* during her final voyage is comprised of various descendants of passengers and crew members of the *S.S. Central America* when she headed to New York from Havana in September 1857. The *S.S. Central America* Project has provided these descendants with some of the few links they have to their past, thus enriching their family histories and our national heritage.

The historical information that shipwrecks can provide gives everyone a rare opportunity to look back into the lives of the passengers and crew members aboard the doomed ships. For many of the descendants of those who have perished in maritime disasters over the years, their only opportunity to learn about their ancestors is provided by historical accounts and analysis of the personal belongings that were lost on the high seas.

The recovery and excavation of the *S.S. Central America* by Columbus-America Discovery Group has led to a new understanding of the lives of the passengers and crew members aboard the doomed ship. In light of the uncertainties and disincentives created by the Fourth Circuit's opinion as a whole, it is apparent that the opinion may well result in the wholesale destruction of shipwreck sites by salvors seeking to maximize monetary gain.

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mand Klare, Patricia Hull Milan, Blair Pomeroy, Jane Look Renard, Dorothea Schweiger, William W. Smith, Glova Spears, Linda Stanton, John C. Tayloe, Henry G. Taylor and Dale W. Wade.

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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INTEREST OF THE AMICI CURIAE

Titanic International, Inc. is a New Jersey nonprofit corporation dedicated to preserving the history of great ocean liners and the people who sailed them. Named for the most famous ocean liner ever, the *RMS Titanic*, Titanic International celebrates all passenger ships. Titanic International actively supports research concerning maritime history, and many of its members are active maritime researchers, compiling statistics and data concerning historic ships.

The group of descendants of passengers and crew members aboard the *S.S. Central America* during her final

voyage is comprised of various descendants of passengers and crew members on the *S.S. Central America* when she headed to New York from Havana in September of 1857.[1] The *S.S. Central America* Project provided these descendants with some of the few links they have to their past, thus enriching their family histories and our national heritage.

These *amici* believe that if the decision below is allowed to stand, it will seriously undermine efforts to recapture our lost heritage, not only in this case but also in future cases.

SUMMARY OF ARGUMENT

Materials and artifacts recovered from long-lost shipwrecks can provide invaluable information for us all. Information can serve as a telescope into our past, clarifying and defining events and information we formerly saw only hazily, if at all. The historical information that shipwrecks can provide gives everyone a rare opportunity to look back into the lives of the passengers and crew members aboard the doomed ships. For some people, such as the descendants of passengers and crew members on the final voyage of the *S.S. Central America*, historical analysis and scientific information about the material recovered from a shipwreck may be the only heritage from ancestors—a heritage that passes into our common culture as a nation.

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[1] These descendants are Captain Herndon Oliver III, USN, and Herndon Oliver, Jr. (descendants of the Captain Herndon who was at the helm of the *S.S. Central America* during her last voyage), Linda Beaver, James F. Bell, Marge Bethard, Charlotte K. Boardman, Elizabeth B. Carrick, Florence Cheeseman, Dottie Smith Dicks, Henry Doerr, Wanda Lee Smith-Dreon, Ruth Hull Falk, Albro T. Gaul, Fred Grant, Genevieve Ellis Gross, Charles Henderson, Normand Klare, Patricia Hull Milan, Blair Pomeroy, Jane Look Renard, Dorothea Schweiger, William W. Smith, Glova Spears, Linda Stanton, John C. Tayloe, Henry G. Taylor and Dale W. Wade.

Other countries around the world have recognized the extraordinary historical opportunity that shipwrecks may provide. Thus, these countries have provided for the protection of underwater cultural heritage by giving special protection to long-lost artifacts recovered from the sea. However, if the decision below is allowed to stand, it will lead to the destruction of irreplaceable artifacts from bygone eras. Thus, the *amici* respectfully request the Court to grant certiorari in this case.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT'S REVIEW OF THIS CASE WILL AFFORD US AN OPPORTUNITY TO RECAPTURE OUR LOST HERITAGE

Ships were the single largest movable objects known to early man. To venture onto the open seas in them was often as daring as going to the moon today; to overcome the formidable violence of the sea is a marvelous feat. Although it is difficult to appreciate the challenges faced by those who traveled the high seas in centuries past, not all must be left to the imagination. Ships from all eras of history have survived, and they reveal to us better than anything else the skillful cunning, craftsmanship, strength and courage that our ancentors used to fight the often relentless forces of the seas. *See generally* Keith Muckelroy, *Maritime Archaeology* (1978). However, if the Fourth Circuit's decision is allowed to stand we will be deprived of the opportunity to learn the many lessons about our past that shipwrecks have to offer.

A. Shipwrecks And Their History Aid In The Study Of Genealogy By Providing Information About Our Ancestors And Our Heritage

For many of the descendants of those who have perished in maritime disasters over the years, their only opportunity to learn about their ancestors is provided by historical accounts and study by scientists and historians

of the personal effects that were lost on the high seas. The case of the *S.S. Central America* is no exception.

"[L]ike the crew and passengers of the Titanic, those aboard the Central America were a varied and colorful lot." Ken Ringle, *Salvaging the Gold of History*, Wash. Post, Nov. 29, 1990 at D1, D8. The passengers and crew of the *S.S. Central America* represented a cross-section of nineteenth-century America and included wealthy tycoons, "Forty-Niners," newlyweds, lawyers, doctors, bankers and even a former dance hall girl. Some of the more notable passengers were Billy Birch, star of the famous San Francisco Minstrels, Ansel and Adeline Easton, a young couple who had exchanged wedding vows only the day before their departure from California; Rufus Allen Lockwood, one of the finest lawyers in California; and Sammy Shreve, founder of Shreve & Co., San Francisco Jewelers. *See* Judy Conrad, *Voices From The Past: Final Voyage*, American History Illustrated, Mar.-Apr. 1991, at 58, 60. Thirty-one of the almost five hundred passengers were women and twenty-nine were young children. For several of the passengers, this was their first ocean voyage; others were businessmen who regularly traveled coast-to-coast. *Id.* at 60.

The passengers enjoyed good sailing weather and spirits were high as they traveled the first leg of their trip from California to Panama. Adeline Easton later recalled that voyage in her memoirs as "one long delight, with smooth waters, sunny skies and a joyous, congenial company." *See* Ringle, *supra*, at D8. The trip to New York from Havana, however, was not so glorious as the skies darkened and the *S.S. Central America* sailed into the fringe of a hurricane. As the storm raged, the passengers and crew members fought valiantly to keep the sidewheel steamer afloat, but their efforts were to no avail.

Upon learning that the *S.S. Central America* was doomed, the highest order of heroism was displayed by all

aboard. Captain Herndon immediately gave orders "that none but the ladies and children should get into the [life] boats, and he was obeyed to the letter." *Story of an American Tragedy* 33 (Judy Conrad ed., 1988) (quoting Frank Jones, New York Daily Tribune, Sept. 21, 1857, at 6). The passengers of the ill-fated *S.S. Central America* acted with "coolness and self-control . . . not a man attempted to get into the boats." *Id.* One passenger observed, "[t]he dangerous, heroic and almost superhuman effort in transferring the women and children in safety to the brig *Marine*, [a passing ship], can scarcely have a parallel." *Id.* (quoting Obed Harvey, Mountain Democrat, Nov. 14, 1857, at 1).

Among all the tales of heroism, the accounts of Captain Herndon shine the brightest. He kept discipline and control in the face of chaos. He assured that all of the women and children were saved before the *S.S. Central America* sank into the depths of the sea. Captain Herndon's brother-in-law and fellow naval officer later recounted:

> Just before the steamer went down, a rowboat was heard approaching. Herndon hailed her; it was the boatswain's boat, rowed by 'hard hands and a gentle heart,' returning from the Brig to report her disabled condition. If she came alongside, she would be engulfed with the sinking ship. Herndon ordered her to keep off. She did so, and was saved. This, so far as I have been able to learn, was his last order. Forgetful of self, mindful of others, his life was beautiful to the last; and in his death he has added a new glory to the annals of the sea.

Letter from Matthew Fontaine Maury, Lieutenant U.S. Navy, to Issac Toucey, Secretary of the Navy, 6 (Oct. 19, 1857) (on file with the National Archives).

Along with tales of heroism were tales of tragedy, including the story of Mary Swan and her husband. Married but a short time and with a newborn child, they

said their last goodbyes to each other shortly before the *S.S. Central America* slid beneath the dark waves. As Mary Swan later recalled,

> [h]e [her husband] said, 'I don't know that I shall ever see you again.' He was very glad to think that I could be taken off. He wanted me to go, and said that he did not care about himself, if it were possible that I could be saved, and the little child. He told me he would try to save himself if an honorable opportunity should present itself after all the women were taken off. He had been sick for three or four days before the disaster, but notwithstanding this, he persisted in keeping his place at the pumps.

Conrad, *supra*, at 33 (quoting Mary Swan, New York Times, Sept. 21, 1857 at 4). Another survivor recalled that after the final life boat approached the rescue ship without her husband,

> I put my face down in my hands, too wretched to speak, reproaching myself that I had not stayed with him, regretting that I had not defied the Captain and all when they ordered us to leave.

Id. at 41 (quoting Adeline Mills Easton, *Lincoln* 26).

B. Information And Analysis Of The Personal Belongings Recovered From Shipwrecks Are Often Our Only Heritage From Those Who Perished In Maritime Disasters

For many of the individuals claimed by the tragedy of shipwrecks, especially the younger passengers, study and analysis by historians of the very items they carried aboard the ill-fated vessels add to our heritage, helping to paint often vivid pictures of those who perished. For example, archaeologists were able to determine a great deal about a certain passenger from the personal possessions found with the wreck of a small Greek trading vessel. The personal belongings found included:

> a pair of very smooth stone mace-heads of the sort that were used for hammering bronze. There were also polishers and whetstones and three large flattish stones of the type used as anvils in the days before iron was available. So there had evidently been a tinker on board. To him also would have belonged the set of balance-pan weights, which were necessary for calculating the price of scrap metal . . . [a] cylinder seal, an essential then for any merchant to mark his goods, was Syrian, as was the only oil lamp found. Altogether the finds suggested . . . a Syrian scrap-metal dealer, who was also a tinker, making his way from Cyprus by the coast of Turkey to the Aegean, supplementing his rations with olives and fish, perhaps playing knuckle-bones in his spare moments by the light of a single lamp. It is a picture at once detailed and intimate . . . .

Paul Johnstone, *The Archaeology of Ships* 24-25 (1974).

Recovery operations at the site of the *S.S. Central America* have likewise uncovered numerous artifacts providing new information about the passengers and crew. In fact, several passenger trunks that survived through their 130 year sojourn on the ocean floor have already been recovered. One such trunk contained:

> varying sized sets of men's clothes . . . a half-dozen completely new top quality woolen undershirts and pairs of socks . . . a cache of cigars and chunks of tobacco, a shaving kit . . . and two books, *The Count of Monte Cristo* and . . . *Lady Lee's Widowhood*. . . .

Tim Noonan, *History Under the Sea*, American History Illustrated, July-Aug. 1992, at 59, 61. From various papers and letters found in the trunk, it was determined that the trunk had once belonged to John Dement. The intimate view of Mr. Dement given by his belongings makes it "almost as if Dement were being introduced to us across the years . . . ." *Id.*

> [A] nineteenth-century historical journal describes John Dement as a muscular, well-built man, rather

> above the average stature, with strong nerves, and apparently he is capable of retaining his presence of mind in emergencies—to which qualities he has been indebted under providence for the preservation of his life on several occasions.

Id. This was certainly the case on the fateful day that the *S.S. Central America* sank to the ocean floor. Dement spent thirteen hours in the water before becoming one of the last two people rescued by a passing ship. *Id.*

In addition to the trunks recovered from the *S.S. Central America*, "other artifacts recovered from the wreck offe[r] a peek at the habits, pretensions and sensibilities of America from the era." *See* Ringle, *supra*, Wash. Post, Nov. 29, 1990, at D8. In fact, a woman's ring recovered by the *S.S. Central America* Project has even led to knowledge about romantic customs of the pre-Civil War era. Although the first stone of the ring is missing, its space is followed by an emerald, a garnet, an amethyst, a ruby and a diamond. Research regarding the ring has revealed that "[a]t the time in the American West, it was customary for a gentleman of means who was attracted to a lady but not sufficiently so to propose marriage, to instead favor her with a ring solemnifying his 'regard' for her." *Id.* The missing stone was thus a ruby, hence the first letter of each stone spelled "regard".

II. THE FOURTH CIRCUIT'S STANDARD FOR PROVING ABANDONMENT RENDERS IT VIRTUALLY CERTAIN THAT LONG-LOST SHIPWRECKS AND THE FAMILY HISTORY THEY PROVIDE WILL BE DESTROYED

For the law of finds and its concomitant duty to preserve a shipwreck to apply, abandonment must first be found. *Columbus-America Discovery Group, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989). The law of salvage, however, imposes no duty to preserve or record *any* of

the invaluable historic, scientific, or archaeological information vital to historical preservation groups such as *amici* associated with the wreck.

The Fourth Circuit's majority opinion breaks with the case law recognizing that abandonment may be inferred or presumed from circumstantial evidence. It adopts a rule, unprecedented in cases dealing with long-lost shipwrecks, which requires the finder of long-lost shipwrecks to prove abandonment by "clear and convincing evidence, such as an owner's express declaration abandoning title," *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464 (4th Cir. 1992), in any case where one purporting to have succeeded to the interest of an original owner appears and asserts a claim.

Because of the passage of time and other factors, there is rarely if ever any evidence that the owner of a long-lost shipwreck or cargo affirmatively renounced all rights to the property. Consequently, most courts facing the issue have held that there is a *presumption* of abandonment in cases of shipwrecks over 100 years old. *See, e.g., Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (presuming abandonment when property is "so long lost that time can be presumed to have eroded any realistic claim of original title"); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (concluding that the "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths"); *Sub-Sal, Inc. v. The Debraak*, No. 84-296, 1992 U.S. Dist. Lexis 2461 (D. Del. Feb. 4, 1992) (holding that abandonment could be inferred in the case of vessel whose location remained unknown for nearly two centuries).

Where courts have not employed a presumption of abandonment, they have nonetheless recognized that

abandonment may be inferred from all of the relevant facts and circumstances, and that it may be determined entirely on the basis of circumstantial evidence. *See Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981), *aff'd without opinion*, 698 F.2d 1215 (5th Cir. 1983). As noted in Judge Widener's dissent to the opinion below, this approach is also consistent with the law of abandonment applicable in non-maritime cases. *See, e.g., United States v. Manning*, 440 F.2d 1105, 1111 (5th Cir. 1971), *cert. denied*, 404 U.S. 837 (1971) ("Whether there has been an abandonment [of a house and car], of course, depends on all the relevant circumstances existing at the time.").

III. COUNTRIES AROUND THE WORLD RECOGNIZE THE IMPORTANCE OF PRESERVING OUR UNDERSEA CULTURAL HERITAGE

Among the countries of the world, America lags behind in its efforts to preserve and protect the underwater cultural heritage of the human race. *See generally* Anastasia Strati, *Deep Seabed Cultural Property And The Common Heritage of Mankind*, 40 Int'l and Comp. L.Q. 859, 863-94 (1991) (discussing the various conventions and treaties entered into by foreign governments to protect underwater cultural heritage).

The Fourth Circuit opinion, applying the law of salvage to long-lost artifacts, is at direct odds with the weight of international jurisprudence on historic shipwrecks. As one international scholar has noted:

> Salvage law provides one of the most inappropriate means to regulate access to marine archaeological sites. The protection of the underwater cultural heritage has never been an objective of this ancient maritime law, whose essence lies in the compensation of the salvor for rescuing maritime property in distress; nor was it ever acknowledged by admiralty until the recently recognized public interest of States in the preservation of historic shipwrecks off their coasts.

> The salvor works for profit and this is reflected in the carrying out of his operations. A good salvage practice might be one that destroys "piece-meal" a marine archaeological site, or neglects to record any of the finds. . . . It is on these grounds that the exclusion of salvage law has been recommended as a minimum requirement of the legal protection of the underwater cultural heritage at national level (citation omitted).

Strati, *supra*, at 872.

Other foreign countries thus follow international law and create a *presumption* that a shipwreck underwater for a certain number of years has historic value and therefore must be protected and preserved as an integral whole. The following countries have enacted legislation that specifically provides for time limits for protection of underwater remains:[2]

Denmark:	100 years underwater
Finland:	100 years old
New Zealand:	60 years underwater
Norway:	100 years old
South Africa:	50 years old
Sweden:	100 years underwater

Thus, the decision below is contrary to the approach taken by numerous other countries in protecting historic shipwrecks. While the opinion of the court below ostensibly encourages salvors to preserve historical and archaeological evidence, *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 468 (4th Cir. 1992), it imposes no duty to engage in such preservation. Moreover, in light of the fact that most commercial salvage—and virtually all salvage on behalf of subrogated insurance companies—is based on contract sal-

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[2] For a discussion of these time limits as well as general heritage legislation, *see* Strati, *supra*, at 872.

vage where the "no cure, no pay rule" applies, such encouragement is illusory. In light of the uncertainties and disincentive created by the opinion as a whole, it is apparent that the opinion may well result in the wholesale destruction of the shipwreck sites by salvors seeking to maximize monetary gain.

CONCLUSION

The *amici* recognize, in part from very personal experiences, that our maritime heritage is important now and to future generations. Much of that history, however, will be lost forever if the decision below is allowed to stand.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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